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No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, DECEASED, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS, PETITIONERS

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM IN BEHALF OF RESPONDENTS

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HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. Robert Sigg-Fehr, Deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, petitioners

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED States, and Howard Sutherland, as Alien Property Custodian

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SUPPLEMENTAL MEMORANDUM IN BEHALF OF RESPONDENTS

Counsel for the petitioners have called our attention to certain statements in the brief in opposition recently filed in this case which they fear will be misunderstood by this Court. Although we believe that a fair reading of the brief will remove the doubts entertained as to the meaning of these statements, we are filing this supplemental memorandum, at the request of counsel for the petitioners, to make these matters clear beyond possibility of misunderstanding.

1. No testimony was introduced in connection with the hearing on April 2, 1928, at which the court entered the order adjudging the deduction of $55,909.83 "unlawful and without right." (R. 60.) We rely in part on portions of the record of proceedings in the suit in equity which was brought to recover the property which was seized, as it was in this same suit in a proceeding subsequent to the entry of the order directing the payment of proceeds of the property seized that the question as to the sum deducted as administrative expenses arose. We assumed, and still contend, that it is proper for this Court to consider anything appearing in the record filed in this Court. We also rely on exhibits attached to the petition for rule to show cause, and on certain general facts in regard to the administration of the Custodian's office as to which there was no testimony but of which, we contend, this Court must take notice.

2. We did not mean to indicate that there was any testimony showing the exact cost of the administration of petitioners' estate by the Custodian. Our contention is, and was, that it would be impracticable to figure such costs and that it is not feasible to apportion any aliquot part of the salaries of particular persons or other general expenses among the numerous estates handled. (See pages 11–12 of our brief in opposition.) The amount deducted is, as has always been admitted, two per cent of the value of the assets turned over to the petitioners, as

shown in the Custodian's statement of property held in trust and in the receipt signed in behalf of the petitioners. (R. 53, 54.) The amount on which this percentage was figured was $2,795,491.34, of which $2,306,491.34 was cash and $489,000 was the par value of Treasury Notes and Liberty Loan bonds.

3. We do not mean to imply by any statement in our brief that any witness testified that the amount deducted was a proper charge for the administration of this estate. What we do contend is that the facts which appear in the record in regard to the amount of the property and the time for which it was held formed a sufficient basis for the Court of Appeals to decide that the sum deducted was not an unreasonable one for the Custodian to charge as administrative expenses.

4. Counsel for the petitioners have also questioned the correctness of our assertion as to the opportunity which they had in the courts below to contend that the charge was an unreasonable one and as to their failure to make any such contention. Regardless of what was actually done, we still are of the opinion that it would have been open to the petitioners to have argued this matter in detail had they desired to do so and that they did not make any real argument on this point. In order, however, that this Court may judge what the contentions of the petitioners were in the courts below, we give the following quotations from their brief filed in the

Court of Appeals. The following statements appear under the heading "Preliminary Statement":

> An examination of the statement submitted by the Custodian to appellees (see Exhibit A, R. pp. 52–53) discloses that appellees are charged with various items actually disbursed or claimed to have been disbursed from their money. These items represent all of the disbursements or expenses of the Custodian which can be identified as directly attributable to the money and property of the appellees involved in this suit.
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> * * * * * * * * * In particular, we challenge the assumption which underlies the whole argument on behalf of appellants that the cost or expense of protecting and administering property is determinable by any arbitrary percentage of its value or amount.

Point I of the argument in that brief is made under the following heading:

> THE ANSWER FAILS TO STATE ANY FACTS SUFFICIENT TO JUSTIFY THE DEDUCTION AND WITHHOLDING BY THE ALIEN PROPERTY CUSTODIAN OF THE SUM OF $55,909.83, OR ANY PART OF IT; AND FOR THAT REASON THE DECREE APPEALED FROM SHOULD BE AFFIRMED

Under this point the brief states:

> * * * In the brief for appellants, it is argued that this sum of $55,909.83 "is no more than a fair and reasonable charge for administering appellees' seized property" (see Brief, p. 31). This is a mere assertion of counsel unsupported by anything in the record and one which in point of fact we

challenge. So far as this answer discloses, the Custodian simply needed money and found it convenient to take this sum from the money which the court had directed him to pay over to the appellees. * * *

Point II of their brief was headed as follows:

THE "EXPENSE OF ADMINISTERING THE MONEY OR PROPERTY," WHICH THE ALIEN PROPERTY CUSTODIAN IS ALLOWED TO DEDUCT, IS AN EXPENSE DIRECTLY CONNECTED WITH THE HANDLING OF THE PARTICULAR FUND, AS DISTINGUISHED FROM ANY PART OF THE GENERAL EXPENSE OF MAINTAINING THE CUSTODIAN'S OFFICE

Point III of their brief was headed as follows:

A STATUTE CHARGING AGAINST SUCCESSFUL CLAIMANTS OF PROPERTY SEIZED BY THE ALIEN PROPERTY CUSTODIAN ANY SUMS FOR ADMINISTRATIVE EXPENSE OTHER THAN SUCH ITEMS AS ARE NECESSARILY AND DIRECTLY ATTRIBUTABLE TO SUCH PROPERTY WOULD BE UNCONSTITUTIONAL

For the reasons stated in the brief in opposition filed by us, we contend that all of the arguments of the petitioners are without merit and that their petition should be denied.

Respectfully submitted.

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